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No._____

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October, 1986 Term

ROBERT C. SPRATT,
Plaintiff-Appellant,

-vs-

COUNTY OF KENT, PHILLIP J. HEFFRON, Sheriff, A. THOMAS PALMER and ROLAND TANIS,

Defendants-Appellees.

No.

ON WRIT OF CERTIORARI
United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI

ROBERT C. SPRATT,
In Pro Per, Appellant
2899 136th Street
Grant, Michigan 49327
(616) 834-8151

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STATEMENT OF THE QUESTIONS PRESENTED

I.

WHERE CONGRESS CHOSE TO SUBJECT PRIVATE AND GOVERNMENTAL EMPLOYERS TO A STATUTORY ANTI-DISCRIMINATION SCHEME REQUIRING "REASONABLE ACCOMMODATION" OF AN EMPLOYEE'S RELIGIOUS BELIEFS, WAS IT ERROR FOR THE LOWER COURTS TO NOT FOLLOW THAT SCHEME IN THE ABSENCE OF FINDING THE STATUTE UNCONSTITUTIONAL?

II.

WHETHER THE COURTS BELOW ERRED IN FINDING THAT TITLE VII'S REQUIREMENTS WERE SATISFIED ON THE BASIS THAT NEUTRALITY PRECLUDED THE EMPLOYER FROM OFFERING ANY ACCOMMODATION?

III.

WHEN CONSIDERING PLAINTIFF'S TITLE VII RELIGIOUS DISCRIMINATION CLAIM, DID THE COURTS BELOW ERR BY FOLLOWING INCORPORATION DOCTRINE ANNOUNCED IN **CANTWELL** V. **CONNECTICUT,** 310 U.S. 296; 84 LEd 1213; 60 S Ct 9001 (1940) AND **EVERSON** V. **BOARD OF EDUC.,** 330 U.S. 1; 91 LEd 711; 67 S Ct 504, (1947), WHICH CONSTRUED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE SUBSTANTIVE LIMITATIONS OF THE FIRST AMENDMENT'S RELIGIOUS CLAUSES AGAINST STATE GOVERNMENTS AND THEIR POLITICAL SUBDIVISIONS?

IV.

WHETHER THE LOWER COURTS ERRED BY CONSTRUING THE ESTABLISHMENT CLAUSE'S NEUTRALITY STANDARD TO PROHIBIT COUNTY PAID SOCIAL WORKERS FROM USING THEIR PROFESSIONAL JUDGMENT AS TO MANNER AND TYPE OF COUNSEL REQUIRED BY UNIQUE AND DIVERSE PRISON INMATE POPULATION?

V.

WHETHER THE LOWER COURTS ERRED BY CONSTRUING THE FREE EXERCISE RIGHTS OF PRISON INMATES TO ONLY REQUIRE "ACCESS TO VOLUNTARY

CHAPLAINS OF ALL FAITHS WHO SERVE THE JAIL," TO THE EXCLUSION OF DIVERSE COUNTY COUNSELORS WITH PROFESSIONAL UNDERSTANDING OF WIDE BREADTH AND DIVERSITY OF COUNSELING THEORIES AND TECHNIQUES, RELIGIOUS OR OTHERWISE?

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REFERENCE TO REPORTS OF LOWER COURTS OPINIONS

The trial court's opinion is reported at: **Spratt** v. **Kent County**, 621 F. Supp 594 (D.C. Mich. 1985). The opinion of the Sixth Circuit Court of Appeals was rendered verbally from the bench following oral arguments and, therefore, no published opinion has been reported. A copy of the bench decision statement form from the Sixth Circuit, and the Judgment and Opinion of the District Court are included in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS OF THIS COURT

On November 7, 1986, the Sixth Circuit Court of Appeals entered its judgment affirming the district court's decision in favor of the defendants-appellees. Appeal is sought by plaintiff under 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

Article III of the U.S. Constitution:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States.—between citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

"Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

"The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

First Amendment to the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the U.S. Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or

rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations and claims shall be held illegal and void.

42 USC 2000e:

"For the purposes of this title [42 USCS Secs 2000 et seq.] —

"(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code [11 USCS Secs. 1 et seq.], or receivers.

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive services (as defined in section 2102 of title 5 of the United States Code [5 USCS Sec. 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS Sec. 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

"(c) The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

"(d) The term 'labor organization' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

"(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

"(f) The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivison.

"(g) The term 'commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia; or a possession of the United States; or between points in the same State but through a point outside thereof.

"(h) The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

"(i) The term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS Sec. 2000e – 2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."

42 USC 2000e – 2(a):

"(a) Employers. It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 USC 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 USC 1985:

"(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding,

hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 USC 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party

found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS Secs. 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS Secs. 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS Secs. 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS Secs. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

MCLA 330.1704; MSA 14.800(704):

Sec. 704. "(1) In addition to the rights, benefits, and privileges guaranteed by other provisions of law, the constitution of 1963, and the constitution of the United States, a recipient of mental health services shall have the rights guaranteed by this chapter.

"(2) The rights enumerated in this chapter shall not be construed to replace or limit any other rights, benefits, or privileges of a recipient of services including the right to treatment by spiritual means if requested by the patient, or by his next of kin or guardian.

"(3) The provisions of this chapter shall be construed to protect and promote the basic human dignity to which a recipient of services is entitled."

Mich Adm Code 1979, Rule 330.7135:

"Rule 7135. (1) A resident shall be permitted treatment by spiritual means on request, or the request of the nearest relative or guardian.

"(2) As used in this rule:

"(a) 'Nearest relative' includes spouse, parents, adult children and siblings, whether nature or adopted, or in their physical absence, another blood relative deemed to be in close association with a resident.

"(b) 'Treatment by spiritual means' encompasses a spiritual discipline or school of thought upon which a resident wishes to rely to aid physical or mental recovery and includes easy access, at the resident's expense, both to printed, recorded, or visual material essential or related to treatment by spiritual means and to a symbolic object of similar significance.

"(3) Opportunity for contact with agencies providing treatment by spiritual means shall be provided in the same manner as residents are permitted to see private physicians.

"(4) The 'right to treatment by spiritual means' includes the right of residents, guardians, or parents of a minor to refuse medication or other treatment on spiritual grounds which predate the current allegations of mental illness or disability, but does not extend to circumstances where either:

"(a) A guardian of the facility has been empowered by a court to consent to or provide treatment and has done so.

"(b) A resident is presently dangerous to self or others and treatment is essential to prevent physical injury.

"(5) The right to treatment by spiritual means does not include the right:

"(a) To use mechanical devices or chemical or organic compounds which are physically harmful.

"(b) To engage in activity prohibited by law.

"(c) To engage in activity which physically harms the resident or others.

"(d) To engage in activity which is inconsistent with court-ordered custody or voluntary placement by a person other than the resident.

"(6) A facility shall insure the right to treatment by spiritual means by adopting policies and procedures which include all of the following:

"(a) Assurance that a resident assents when a request is by the nearest relative or a guardian.

"(b) Recourse to court proceedings when there is refusal of medication or other treatment for a minor.

"(c) Notice to the requesting person of a denial of a request and the reasons for denial.

"(7) A facility shall provide for administrative review or appeal of denial of treatment by spiritual means at the option of a person requesting treatment."

STATEMENT OF THE CASE

Statement of Proceedings

Plaintiff-appellant brought this action against his former employer and his supervisors, alleging that he was unjustly discharged from employment because of his religious beliefs. The individual defendants are Phillip Heffron, the County Sheriff; A. Thomas Palmer, a lieutenant in the sheriff's department and in charge of inmate services at the County correctional facility; and Roland Tanis, an employee of the sheriff's department, in charge of the counselors.

The suit was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, **et seq.**, and 42 U.S.C. 1983 and 1985. Plaintiff sought declaratory and injunctive relief in addition to reinstatement, back pay, damages authorized by 42 USC 1983, 1985, and attorney fees and costs pursuant to 42 USC 2000e – 5(k), 1988. Federal jurisdiction was premised upon 28 USC 1331, 1343, 2201, and 2202, as well as 42 USC 1343, 1983, 1985 and 2000e.

Prior to commencing this action, plaintiff filed a charge against defendants with the EEOC and received his right to sue letter on August 7, 1981. Thereafter, in a timely manner, he filed his complaint with the U.S. District Court for the Western District of Michigan.

The case was tried before Judge Benjamin F. Gibson. In an opinion and judgment dated November 12, 1985, Judge Gibson found in favor of defendants and entered judgment against plaintiff. From this final judgment plaintiff appealed as a matter of right to the Sixth Circuit Court of Appeals. On November 7, 1986, following oral arguments, the Court of Appeals affirmed the trial court's decision.

Statement of Facts

Plaintiff-Appeallant Robert Spratt is a citizen of the United States and a resident of Michigan. He obtained a Bachelor of Science Degree and Masters Degree in Social Sciences from Michigan State University (Spratt at Tr 4-5). Mr. Spratt was employed by Kent County as a mental health counselor; his job was to provide counseling and therapy for mentally ill inmates in the County's jail system (Spratt at Tr 7). Initially, he was placed at an honor camp and later transferred to the jail facility (Spratt at Tr 7, 14). The primary objective of appellant's counseling as a psychiatric social worker for the County was to effectively treat mental illness to reduce the inmate-patient's propensity towards crime and violence and thereby provide for a more secure jail and society (Spratt at Tr 50 and VanderKodde at Tr 181).

When initiating therapy, Mr. Spratt usually spent the first few ses-

sions diagnosing the individual's problem. Thereafter, he presented the treatment options (Spratt at Tr 13). One of those options might be a counseling technique known as treatment by spiritual means (Spratt at Tr 11). This modality is a means of using the counselee's religious background and beliefs to address the individual's psychological problems. Expert testimony was introduced by plaintiff to show that this technique is a professionally recognized and acceptable treatment (Dr. Pelletier at Tr 135-136).

Although he might, on occasion if asked, recommend one technique over the rest, Mr. Spratt generally did not encourage or influence the inmate as to the selection of treatment methods (Spratt at Tr 35). Only when the inmate requested the spiritual means treatment did Mr. Spratt provide it (Spratt at Tr 32-33, 35). Testimony was also presented to show that Mr. Spratt did not coerce this technique upon inmates. The decision rested solely with the inmate (Spratt at Tr 32, 156).

Mr. Spratt is a Pentecostal Christian (Spratt at Tr 19). There is no dispute that his beliefs are sincerely held. As a Pentecostal Christian, plaintiff is obliged to share his beliefs with those who express an interest.

While at the honor camp, he was responsible for counseling young people, principally first time offenders. Mr. Spratt was employed there for approximately 16 months (Spratt at Tr 13). During that time, and throughout his employment with the County, he employed the spiritual treatment when requested. He was never disciplined for doing so while at the camp (Spratt at Tr 14).

In September, 1978, Mr. Spratt was transferred to the jail. He was told that the move was not disciplinary in nature but, rather, that his services were needed more at the jail (Spratt at Tr 15). At the jail, Mr. Spratt continued his professional counseling techniques, including the spiritual means when requested and appropriate in his professional judgment.

During Mr. Spratt's employment, the Sheriff's Department announced a policy which prohibited its counselors from treating inmates by "spiritual means" even if requested by a particular prisoner (Spratt at Tr 48). This policy, according to defendants, required that counselors keep "religion" completely out of therapy and precluded use of the Bible, prayer and even discussion of religious topics (Heffron at Tr 278).

Plaintiff's expert witness, however, testified that treatment by "spritual means" is an appropriate counseling method in certain cases (Dr. Pelletier at Tr 135-136). Moreover, the Michigan Department of Mental Health's administrative rules guarantee inmates treatment by

spiritual means upon request (Spratt at Tr 114). Defendants did not introduce evidence to contradict this evidence. Indeed, none of the defendants have training or experience in professional counseling (Palmer at Tr 213-214). Yet, they established a policy which is contrary to accepted practices of the counseling profession.

Mr. Spratt attempted to resolve the Sheriff's concerns by employing "spiritual means" treatment only if it was requested. Indeed, he even drafted a waiver and release form for the inmate to sign in cases where this type of therapy was requested (Spratt at Tr 53-54). This form was intended to address the Sheriff's stated fears that an inmate might claim that religion was being forced upon him.

During the course of Mr. Spratt's employment at the jail, there were several meetings with various defendants on the "spiritual means" treatment. In each case, appellant was ordered to stop religious practices in counseling; and it was apparent that the defendants did not ever attempt to tolerate Mr. Spratt's use of religion in counseling sessions or otherwise. Defendants never attempted to develop and implement any specific guidelines concerning the procedures to be used in the event treatment by spiritual means was indicated or requested by an inmate (Spratt at TR 25, Palmer at Tr 222-223, and Heffron at Tr 277). This policy was issued even though defendants knew at the time he was hired that Mr. Spratt used religious practices in his treatment of mental illness (Spratt at Tr 9 and Dr. Pelletier at Tr 140-141).

Mr. Spratt indicated that the defendants' policy contravened his professional judgment that spiritual means is a legitimate counseling method and his personal religious beliefs that if someone seeks spiritual help, he must give it (Spratt at Tr 169-170). Mr. Spratt, therefore, continued to act on these convictions. In response, the defendants began to discipline him for "insubordination."

Ironically, Mr. Spratt testified that at least one other counselor used Biblical scriptures in counseling. This individual, though, was a different denomination. The defendants did not take action against that counselor (Spratt at Tr 46-47).

There is evidence that the defendants then set out to investigate Mr. Spratt's counseling techniques (Sprat at Tr 52-53; Palmer at Tr 220-221). After his suspension on December 17, 1979, defendants Palmer and Tanis interviewed plaintiff's clients and others, and reported to Sheriff Heffron (Palmer at Tr 203-204, 211, 221, 229). The sheriff, in turn, assigned a sergeant on his staff to conduct an investigation in conjunction with Lt. Palmer and Mr. Tanis (Heffron at Tr 258-259).

On February 26, 1980, Mr. Spratt was reprimanded for using these

waiver forms (Spratt at Tr 54-55). The reason given was that he had not obtained approval from any of his supervisors for using them. The same day, Sheriff Heffron fired Mr. Spratt for insubordination (Spratt at Tr 55). In the termination letter, the sheriff informed Mr. Spratt that he was being discharged because he "continued to practice an improper mix of religion and psychological counseling" and did not "have a desire or willingness to follow the direction given to [him] . . ." (Defendants' Deposition Exhibit T, letter from Heffron dated February 26, 1980).

When asked whether he made any effort to accommodate plaintiff's religious beliefs within the context of his counseling practices, Sheriff Heffron opined that it was simply not possible. He felt compelled by law not to allow religious counseling by a county social worker (Heffron at Tr 262-263). The defendants never sought advice nor consulted with other mental health professionals, such as psychiatrists and psychologists, concerning this issue (Palmer at Tr 235 and Heffron at Tr 277, 283). He indicated that the only solution was to completely prohibit religious counseling (Heffron at Tr 267).

Instead, Sheriff Heffron testified that the spiritual needs of inmates were met by a corps of volunteer chaplains (Heffron at Tr 246-247). In his opinion, he must maintain religious neutrality in the jail. He believed that is accomplished by silencing county-paid social workers while allowing volunteers to provide for the prisoner's religious needs (Heffron at Tr 246-247, 262-263). There was no showing that these volunteer chaplains were in any way qualified by training or experience to treat mental problems by spiritual means. Similarly, Lt. Palmer indicated that he had made no effort to accommodate Mr. Spratt's religious beliefs, and explained that he believed those beliefs did not fit in with the job plaintiff was hired to perform (Palmer at Tr 233).

The defendants did not produce any of Mr. Spratt's counseling patients to complain of his treatment by spiritual means. There was no showing that he forced it on anyone. Likewise, there was no showing that this counseling technique disrupted the jail, created a disturbance, or threatened security. Instead, the defendants relied solely upon some hearsay complaints allegedly expressed by some inmates and a letter from one inmate's mother (VanderKodde at Tr 181; Palmer at Tr 202; 203; 205; 207). After being fired, Mr. Spratt attempted to locate work and made numerous attempts to find a position (Spratt at Tr 55-56). He held two part-time jobs while establishing his own counseling center. As of the date of trial, he had lost $110,000 in wages (Spratt at Tr 56-60).

ARGUMENT I

WHERE CONGRESS CHOSE TO SUBJECT PRIVATE AND GOVERNMENTAL EMPLOYERS TO A STATUTORY ANTI-DISCRIMINATION SCHEME REQUIRING 'REASONABLE ACCOMMODATION' OF AN EMPLOYEE'S RELIGIOUS BELIEFS, IT WAS ERROR FOR COURTS BELOW NOT TO FOLLOW SCHEME IN THE ABSENCE OF AN EXPRESS FINDING OF UNCONSTITUTIONALITY.

It is the function of a court to interpret and apply the law already enacted but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. **Simpson** v. **Shepard** (Minnesota rate cases), 230 U.S. 3521; 57 LEd 1511; 33 S Ct 729 (1913). It is no part of the duty of the judiciary, in connection with deciding the Constitutionality of a statute, to limit the statute by striking out words and by inserting words which are not in it. **Marchetti** v. **United States**, 390 U.S. 39; 19 LEd 2d 889; 88 S Ct 697 (1968). It must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise a power which it possesses. **Re Rapier**, 143 U.S. 110; 36 LEd 93; 12 S Ct 374 (1892).

Appellant Spratt filed a cause of action, alleging **inter alia**, that appellees discriminated against him as an employee in their employment practices on the basis of his religion in violation of 42 U.S.C. 2000e – 2(a)(1) & (2) and 42 U.S.C. 2000e(j). (Title VII).

The pertinent part of the former statute provides:

> "It shall be an unlawful employment practice for an employer
>
> "1. to . . . discharge any individual, or other discriminate against any individual with respect to his terms, conditions, or privileges of employment, because of such individual's . . . religion, or
>
> "2. limit, segregate, or classify his employees . . . in any way which would . . . effect his status as an employee, because of such individual's . . . religion . . ." 42 U.S.C. 2000e – 2(a)(1), (2).

Similarly, the latter statute provides in relevant part:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

Title VII is an anti-discrimination law, not a law "respecting an establishment of religion or prohibiting the free exercise thereof." The trial court erred as a matter of law by considering plaintiff employee's Title VII religious discrimination claim in light of establishment and free exercise accommodation criteria. The court was solely bound to consider claim according to the express mandates of the statute itself which requires reasonable accommodation based on individual facts and circumstances.

The trial court found that "for the purposes of plaintiff's Title VII argument (42 U.S.C. 2000e – 2(a)(1) & (2)) the Court will assume arguendo that his praying and sharing scripture with inmates was a religious practice." (Opinion p. 20, f.n. 2) In the body of the opinion, however, the trial court neither applied the "reasonable accommodation" nor "undue hardship" provision of the Title VII statute. Instead, the Court applied an establishment and free exercise clause accommodation analysis. When it employed the words "accommodation" and "reasonableness" they were not used in the sense which the statute intended. These words were used in the establishment and free exercise clause accommodation sense.

The trial court concluded as a matter of law:

> "1. that the 'Sheriff had an obligation under the establishment clause of the Constitution to maintain a policy of neutrality on religious matters (citations omitted)" (Opinion, p 3).

This meant that, as a matter of law, any accommodation by a governmental employer of employee's religious beliefs violated the establishment clause. For all intents and purposes, this rendered the "reasonable accommodation" provision of the statute unconstitutional as applied.

The trial court further concluded:

> "2. that 'at the same time, Sheriff Heffron had an obligation to allow for the free religious exercise of the inmates (citations omitted)'" (Opinion p 14).

This meant that as a matter of law an accommodation by employer of employee's religion, violated the free exercise rights of inmate counselees. For all intents and purposes, this rendered the statute's "reasonable accommodation" provision unconstitutional as applied.

The court, however, did not find Title VII to be unconstitutional. Since it did not so conclude, it was bound to apply the statutory test and is barred from rewriting the statute. **Blount** v. **Rizzi,** 400 U.S. 410; 27 LEd 2d 498; 91 S Ct 423 (1971).

The court is not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and

origins may require. **District of Columbia** v. **Carter,** 409 U.S. 418; 34 LEd2d 613; 93 S Ct 602 (1973).

The concern of the judiciary is with the power to enact a statute, not its wisdom. **Helvering** v. **Davis,** 301 U.S. 619; 81 LEd 1307; 57 S Ct 904 (1937). The courts have no concern with the wisdom of a statute. It is enough for its enforcement that it is written plainly and does not transcend the limits of the legislative power. **Brotherhood of R. Trainmen, E.L.** v. **Toledo, P. & W.R. Co.,** 321 U.S. 50; 88 LEd 534; 64 S Ct 413 (1944); **Thornley** v. **United States,** 113 U.S. 310; 28 LEd 999; 5 S Ct 491 (1885).

Without an express finding of its unconstitutionality, the court ignored the statute at issue and its plain requirement that "an employer demonstrate that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). The trial court drew distinctions where the statute provided none. The statute made no distinctions between a public or a private employer, or between a governmental or non-governmental employer. 42 U.S.C. 2000e(b). All were bound to reasonably accommodate. All were bound to demonstrate an undue hardship on the present conduct of business.

The district court went through the motions of applying Congress' reasonable accommodation scheme. It expressly modified, however, the extent to which such a scheme would have the meaning and impact which Congress intended, according to the legislative history. It did this by independently balancing the free exercise and establishment clauses prior to considering the Congressional scheme of reasonable accommodation. Such a scheme of accommodation, according to legislative history, incorporated and embodied the free exercise and establishment clauses of the Constitution as interpreted and applied according to Congress' judgment. If the statute is not declared unconstitutional, then Congress' judgment is sufficient.

An analysis of the statute, and its legislative history reveals that Congress considered the Establishment and Free Exercise Clauses of the First Amendment and balanced them. See U.S. Senate Subcommittee on Labor, of the Committee on Labor and Public Welfare, **Legislative History of the Equal Employment Opportunity Act of 1972,** (H.R. 1746, P.L. 92-261) amending Title VII of the Civil Rights Acts of 1964 (92nd Cong., 2d sess., 1972).

That history clearly indicates that when the Congress modified the 1964 Statute in 1972 it considered:

a. the First Amendment to the Constitution (**supra** at 715),

b. the inclusion of public employers such as Defendant in the

employment opportunity scheme (**supra** at 1813, 1844),

c. the shortcomings of the religious anti-discrimination requirement of the original statute (**supra** at 711-715), and

d. undesirable judicial construction of that anti-discrimination scheme (**supra** at 1845).

After expressly considering all of these factors, including a discussion of the First Amendment, both in its establishment and free exercise implications, and weighing all the facts relevant, the Congress expressly amended the statute. Its amendment brought public employers under its operation. It adopted the religious accommodation requirements which binds public employers. If there was any flexibility in its application, Mr. Randolph, the amendment's sponsor, correctly observed that flexibility was to be found "in the language of the amendment . . ." (**supra** at 714). Thus, Congress established a statutory reference point to secure an employee's religious liberty, correctly understood in light of the Constitution.

What is crucial for this appeal is that the trial court found for the defendant-appellee on the basis of the evidence in light of the "Constitutional law in the area religious practice" (Opinion p. 13) rather than in light of congressional judgment about what the Constitution requires of employers who have religious employees. In essence, then, the trial court ignored the express legislative will and instead substituted its judgment.

Simply stated, the judiciary has usurped a legislative function. The courts below analyzed the requirements of the First Amendment religion clauses after Congress expressly did that very analysis in formulating the statute. In doing so, the lower courts effectively deleted the statute's requirement that a governmental employer reasonably accommodate its employees' religious beliefs.

By usurpating the legislative branch, the courts below have decided an important question of federal law contrary to Article III of the United States Constitution and the applicable decisions of this Court, as cited above. See also, **Bowsher** v. **Syner,** ____ U.S. ____, 54 U.S.L.W. 5064 (July 7, 1986) (separation of powers).

II.

THE COURTS BELOW ERRED IN FINDING THAT TITLE VII'S REQUIREMENTS WERE SATISFIED ON THE BASIS THAT NEUTRALITY PRECLUDED THE EMPLOYER FROM OFFERING ANY ACCOMMODATION.

The employer was aware that the religious practice for which Mr.

Spratt was seeking accommodation was a religiously-compelled need, when called upon, to engage in prayer, quoting of scriptures, and, to some extent, evangelizing (Opinion, p. 13). With the exception of volunteer chaplains, the employer forbade all religious practices in counseling by their social workers, even when requested by inmates. The trial court's opinion affirms the County's position that these practices may be forbidden because the Establishment Clause's neutrality requirement makes it impossible for the governmental unit to permit them and, at the same time, protect the rights of inmates against state establishment of religion and the potential violation of the free exercise of their religion.

Nonetheless, the primary question that the Court should have addressed was not whether these practices should be forbidden because they could not be accommodated under the neutrality standards of the First Amendment. Instead, the crucial issue is whether the employer explored, attempted and offered the employee the least disadvantageous scheme of accommodation of each of the religious practices, while at the same time preventing violations of the Establishment Clause and inmates' free exercise rights. Anything less does not constitute a reasonable accommodation and fosters an untutored devotion to neutrality which can result in hostility to religion in penal institutions by overemphasizing the secular.

The employee who has properly put his employer on notice of the employee's religious needs is not required to show that he, the employee, made any effort to either compromise or accommodate his own religious beliefs before the employer is obligated to attempt an accommodation. **Redman** v. **GAF Corp.**, 574 F.2d 897, 901-2 (7th Cir. 1978); **Anderson** v. **General Dynamics Convair**, 589 F.2d 397, 401 Note 3 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979).

Title VII of the Civil Rights Act of 1964, as amended, provides that an employee's religious practices, observances and beliefs **must** be accommodated "unless an employer demonstrates that he is unable to reasonably accommodate without undue hardship on the conduct of the employer's business." **Riley** v. **Bendix Corp.**, 464 F.2d 1113 (5th Cir. 1972) quoting Sec. 701(j) of Title VII of amendment of 1972 (42 USC 2000e(j)).

Thus, any analysis of religious discrimination centers on two related issues: (1) Did the employer make a "reasonable accommodation" to the religious needs of the employee; and (2) Was the employer excused from accommodating the employee on the grounds of "undue hardship".

In October of 1979 the EEOC issued its guidelines on discrimination

because of religion. These guidelines sought to clarify the obligations imposed on employers by Sec. 701(j) (42 USC 2000e(j)). The guidelines at 29 CFR Sec. 1605.2 state:

> "(b) Duty of Accommodate (1) Sec. 701(j) makes it an unlawful employment practice under Sec. 703(a)(1) for an employer to fail to reasonably accommodate the religious practices and beliefs of an employee or prospective employee."

The guidelines further provide that once an employer learns of an employee's need for a religious accommodation, the employer has an obligation to explore all possible methods of reasonable accommodation. 29 CFR 1605.2(c) A refusal to accommodate can be justified only when the employer can demonstrate that an undue hardship would "in fact" result from such alternative considered. **Redman** v. **GAF Corp., supra, Brown** v. **General Motors Corp.,** 601 F.2d 956 (8th Cir. 1979).

The burden is on the employer to undertake initial steps toward accommodation. An employer cannot excuse its failure to accommodate by pointing to deficiencies in employee's suggested accommodation. **Anderson** v. **General Dynamics Convair, supra,** at 401. Further, proof of an effort by the employer to accommodate the religious practices of an employee is required before the employer can be allowed to raise the defense of undue hardship. **Claybaugh** v. **Pacific Northwest Bell Telephone Co.,** 355 F. Supp. 1 (1973).

The Court in **Claybaugh,** analyzing EEOC guidelines requiring religious accommodation, the predecessors of Sec. 701(j), found the guidelines to place an affirmative duty upon employer to attempt an accommodation. Absent such affirmative action, the Court reasoned, an employer cannot sustain its burden of showing undue hardship. The decision rejected the Defendant's good faith defense that scheduling difficulties alone gave legality to the contested discharge and the employer's refusal to accommodate.

Once a Plaintiff has established a prima facie case of religious discrimination, the burden is on the Defendant to prove that a good faith effort was made to accommodate the religious beliefs of the Plaintiff and that the efforts were unsuccessful, and further, that they were unable reasonably to accommodate those beliefs without undue hardship. **Burns** v. **Southern Pacific Transportation Co.,** 589 F.2d 403, 405 (9th Cir. 1978), cert denied 439 U.S. 1072 (1979); See also, **Ansonia Board of Education** v. **Philbrook, ____ U.S. ____, 55 U.S.L.W. 4019, 4021 (Nov. 17, 1986).**

The United States Supreme Court in Transworld Airlines v. **Hardison,** 432 U.S. 63, 97 S Ct 2264, 53 LEd 2d 113, (1977), addressed

the scope of Title VII's reasonable accommodation undue hardship standard. It ruled that to require an employer to bear more than a de minimus cost would constitute undue hardship and that, absent clear congressional intent, pre-existent seniority provisions of a collective bargaining agreement would not have to yeild to an accommodation. Id, at 79-80.

After the court's **Hardison** decision in 1977, the EEOC became concerned about the apparent confusion over what kinds of religious accommodations were required by employers and labor organizations. The Commission found that various kinds of religious practices were not being accommodated and issued new guidelines on discrimination because of religion. 29 CFR 1605, as amended by 45 Fed. Regs. 72610 (1980). These new guidelines broadly defined religious beliefs and practices. In announcing a duty to attempt reasonable accommodations, it outlined two areas that the EEOC will explore in determining whether an offer of accommodation is reasonable; (1) The alternatives offered to the employee, and (2) Whether the employer and/or labor organization offered the aggrieved employee the alternative which least disadvantaged the employee. Id, at Sec. 1605.2.

While the record shows that the sheriff gave some thought to accommodation of the employee's religious practices in counseling, he did not attempt to accommodate those practices because he believed the problem was insufferable. Thus, he forbade the practices before exploring alternative schemes of accommodation, attempting them, and then offering the least disadvantageous scheme to appellant.

The trial court found that the employer did the following:

1. "**advised** plaintiff that he had a policy that prohibited the county social worker from using religious counseling techniques." (Emphasis added)

2. "**warned** plaintiff repeatedly when he discovered that plaintiff was crossing the line that his policy laid down." (Emphasis added)

3. "**asked** for legal advice to determine whether plaintiff's religious needs **could be** accommodated." (Emphasis added)

4. "**gave** plaintiff **numerous opportunities** to change his practices." (Emphasis added) (Opinion p. 14)

Because of its policy of absolutely no religion in counseling under any circumstances, the County missed numerous opportunities to accommodate the religiously held needs of appellant that would have precluded the necessity to terminate him. Between the meeting of April 19, 1979, when appellant was ordered by the sheriff to completely discontinue religious practices in counseling, and the suspension of December 17, 1979, there was no attempt on the part of the County to accom-

modate as to type and nature of the religious practices in question and outline the circumstances under which they could be reasonably implemented. Had such an effort been undertaken, there is little doubt that there would have been no need for a suspension and impending termination. Even the circumstances under which the suspension occurred would not have transpired had the sheriff realized that Constitutional neutrality under the Establishment and Free Exercise Clauses would have permitted these religious practices as a last resort to achieve their secular purposes where secular means had failed.

Likewise, after appellant's suspension, the County showed no attitude of intent to accommodate the specific religious practices desired. Instead, they instituted an investigation of appellant's counseling and sought legal advice to rationalize their position and justify termination of appellant for noncompliance. To chastise appellant for the County's negligence and failure to properly accommodate resulted in a travesty of justice to all concerned and a direct violation of Title VII.

It is apparent under the circumstances that the employee could have been offered many plans of accommodation that may have, to some degree, reasonably accommodated his need to share scripture, pray, and to some extent evangelize and still permit the employer to remain constitutionally neutral as to religion. For instance, the County could permit the employee to implement nondevotional religious practices in treating inmates as a last resort when secular means failed to achieve the desired results. Under this plan, written consent could be required of the inmate prior to treatment by spiritual means.

Another alternative is to permit the employee to serve, on his own time, as a volunteer chaplain. If Mr. Spratt had a patient-inmate who was receptive to treatment by spiritual means, the employee should have been offered the option of providing such treatment in a capacity as a chaplain. Here, too, written consents could be utilized to document the voluntary nature of the inmate's participation.

Yet another option is to permit the inmate to select **inter alia** treatment by spiritual means. The employee could be required to outline and offer a comprehensive treatment plan which would include both secular and spiritual means of treatment. A checklist outlining the various modes of treatment and practice could be given the inmate to check, thereby giving him the right to select the kind of treatment he feels most suited to his needs and problems. To prevent any potential violation of the inmate's free exercise rights, the employee could be instructed to not render an opinion as to what he feels would best be suited to the patient's needs even if the patient elicits such an opinion.

Furthermore, as an accommodation the County could have permitted

nondevotional, nonconvertive religious practices in treatment when the patient/inmate's emotional condition due to incarceration countervails his own religious beliefs and such religious practices strengthen his own religion. This plan would protect the inmate's own religious liberties, and the resulting mental health would effectuate a more secure jail and society through reduced propensity of the inmate towards crime and violence.

Finally, but by no means all inclusively, in attempting a proper accommodation scheme the County could have even required appellant to abstain from evangelistic practices while permitting nondevotional, nonconvertive religious practices in conjunction with any one or more of the above-mentioned schemes. This is far more acceptable to all persons concerned than the County absolutely prohibiting all religious activities in counseling.

Had the employer made a good faith effort to explore the alternatives, attempt reasonable accommodation, and offer the most advantageous scheme of accommodation to Mr. Spratt, a plan would have been presented which would permit and protect the free exercise and establishment rights of inmates while providing the most comprehensive and quality mental health care possible. To claim an undue hardship as a bar to the employer's statutory duty to reasonably accommodate in this manner is contrary to statute and established precedent. Since the decisions below conflict with the federal statute and well established precedent, review by this Court is critical.

In addition, the unique circumstances of this case afford this Court an opportunity to settle an important question of Federal Law which has not been, but should be, settled by this Court and which significantly impacts the nature and extent to which religious practices in conjunction with treatment of mental illness may be permitted in the nation's jails and prisons.

III.

WHEN CONSIDERING PLAINTIFF'S TITLE VII RELIGIOUS DISCRIMINATION CLAIM, THE COURTS BELOW ERRED BY FOLLOWING THE INCORPORATION DOCTRINE ANNOUNCED IN CANTWELL V. CONNECTICUT, 310 US. 296; 84 LEd 1213; 60 S Ct 900 (1940); and EVERSON V. BOARD OF EDUC., 330 U.S. 1; 91 LEd 711; 67 S Ct 504 (1947), WHICH CONSTRUED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE SUBSTANTIVE LIMITATIONS OF THE FIRST AMENDMENT'S RELIGION CLAUSES AGAINST STATE GOVERNMENTS AND THEIR POLITICAL SUBDIVISIONS.

The intention of the framers, as embodied in the First and the Fourteenth Amendments, never meant to apply the first ten amendments against the States. The Supreme Court has rejected the idea that the entire Bill of Rights is incorporated into the first ten amendments. In **Adamson** v. **California,** 332 US 46; 91 LEd 1903; 67 S Ct 1672; reh den 332 US 784; 92 LEd 367; 68 S Ct 27 (1947) (Fifth Amendment self-incrimination case), the Court rejected Justice Black's dissenting argument for complete incorporation (**supra** at 68).

Justice Frankfurther's concurring opinion rejected both complete incorporation and selective incorporation, declaring:

> "It seems pretty late in the day to suggest that a phrase so laden with historical meaning [due process of law] should be given an improvised content consisting of some but not all of the provisions of the first eight amendments, selected on an undefined basis, with improvisation of context for the provisions so selected." (**Id.** at 67).

The Court, however, has achieved the same result but through a different judicial mechanism. Where the Court is of the opinion that a provision of the Bill of Rights was meant to protect a fundamental concept of ordered liberty, then it should be binding upon the states by judicial fiat. See **Palko** v. **Connecticut,** 302 U.S. 319, 325; 82 LEd 288; 58 S Ct 149 (1937), **Cantwell** v. **Connecticut,** 310 U.S. 296, 303; 84 LEd 1213; 60 S Ct 900 (1940), and **Everson** v. **Board of Education,** 330 U.S. 1; 91 LEd 711; 67 S Ct 504 (1946).

Indeed, the Supreme Court has held that the religion clauses of the First Amendment are made applicable to the states by the Fourteenth Amendment. An examination of the history of the First and Fourteenth Amendments, however, yields the conclusion that the Supreme Court's holdings in these areas are contrary to the original intent of the framers.

The intent of the establishment clause was summarized by Justice Joseph Story, who served on the Supreme Court from 1811 to 1845:

> "At the time of the adoption of the Constitution, and of the First Amendment to it . . . , the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation." Joseph Story, **Commentaries on the Constitution of the United States** (3rd ed., 1858) secs. 1872, 1877.

According to Story, "the real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." (Id. at 1877).

The first eight amendments to the Bill of Rights were intended by the First Congress and by the states which ratified them to protect specific rights against invasion by the federal government. The state governments were not bound by those provisions. See, e.g., **Barron** v. **Baltimore,** 32 U.S. (7 Pet.) 243, 250; 8 LEd 672 (1833); and **Permioli** v. **First Municipality,** 44 U.S. (3 How.) 589; 11 LEd 739 (1845) (the Court specifically held that the free exercise clause of the First Amendment was inapplicable to the states. For protection of their rights against invasion by state governments, the people placed their primary reliance upon State Constitutions).

Charles Fairman, in his definitive article entitled, **"Does the Fourteenth Amendment Incorporate the Bill of Rights?",** 2 Stanford Law Review 5, 134(1949), assembled clear and convincing evidence from the congressional debates, the state ratifying proceedings and other original sources which support the conclusion that the framers and ratifiers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable against the states.

Even if there were nothing else in the record, the history of the Blaine Amendment would demonstrate conclusively that neither the free exercise or establishment clause were intended by the Fourteenth Amendment to be applied against the states. The last third of the nineteenth century saw a heightened public interest in the role of religion in public education. This interest was reflected in the history of the Blaine Amendment. In 1875, seven years after the Fourteenth Amendment was adopted, President Ulysses S. Grant, in an annual message to Congress, called for a constitutional amendment, which when introduced in the House of Representatives that year, read: "No **state** shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . ." (4 Cong. Rec. 44th Cong., 205) (Emphasis added).

What is particularly controlling is that the Blaine Amendment was introduced in Congress twenty times between 1876 and 1929, but it never received the requisite 2/3 majority and thus was never referred for ratification to the states. See **Proposed Amendments to the Constitution,** H.R. Doc. No. 551 (70th Cong., 1st Sess.), 182; See also, Meyer, **The Blaine Amendment and the Bill of Rights,** 64 Harvard L. Rev. 939 (1951); and O'Brien, **The States and "No Establishment": Proposed Amendments to the Constitution Since 1798,** 4 Washburn L. Journal 183, 187 (1965).

The fact that the Congress of 1875-76, which considered the Blaine Amendment, included 23 members of the 39th Congress which submitted the Fourteenth Amendment to the states, is also a powerful testimony to the framers' intentions. Not one of the several representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier.

O'Brien documented the debate on the Blaine Amendment and noted that:

> "Congressman Banks, a member of the 39th Congress, observed that 'If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment, it prohibits the states from exercising a power they now exercise.' Senator Frelinghuysen of New Jersey urged the passage of the House article which prohibits the states for the first time, from establishment of religion, from prohibiting its free exercise.' Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: 'Friend as he was of religious freedom, he would never have consented that the states . . . should be degraded and that the government of the United States, a government of limited authority, a mere agent of the states with prescribed powers, should undertake to take possession of their schools and of their religion.' Remarks of Randolph, Christiansy, Kernan, Whyte, Bogy and Eaton, as well as Morten gave confirmation to the belief that none of the legislatures in 1875 thought that the Fourteenth Amendment incorporated the religious provisions of the First." O'Brien, **Justice Reed and the First Amendment** (1958), 116-17.

The historical record is also clear that five of the thirteen states had religious establishments when the Constitutional Convention completed their activities in 1787. They included Connecticut, Massachusetts, New Hampshire, Georgia and South Carolina. It was not until 1833 when Massachusetts, of its own accord, disestablished its state church.

As Justice Harlan noted in **Oregon** v. **Mitchell,** 400 U.S. 112, 203; 27 LEd2d 272, 326; 91 S Ct 260, 304 (1970):

> [T]he federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society; it is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people; when the Court disregards

> **the express intent and understanding of the framers of the Constitution,** it invades the realm of the political process to which the amending power was committed, and it violates the constitutional structure which is its highest duty to protect; . . . the Court is not justified in substituting its own view of wise policy for the commands of the Constitution . . . (emphasis added)

In order that this Court not "invade the realm of the political process to which the amending power was committed," an examination of the "express intent and understanding of the framers of the Constitution" is essential.

Because of the plain reasons expressed herein, the Constitution, the nature of judicial power, and the "political process to which the amending power was committed," the incorporation doctrine announced in **Cantwell** and **Everson** may not be followed. The judgment below is erroneous as a matter of law and should be reversed to the extent that this Court finds it applicable to plaintiff's Title VII claim.

Clearly, this argument involves a major issue in American jurisprudence, which is presently the subject of hot debate. This case provides the Court the opportunity to give a definitive statement of leadership in this controversy which goes to the heart of federalism.

IV.

THE LOWER COURTS ERRED BY CONSTRUING THE ESTABLISHMENT CLAUSE'S NEUTRALITY STANDARD TO PROHIBIT COUNTY PAID SOCIAL WORKERS FROM USING THEIR PROFESSIONAL JUDGMENT AS TO MANNER AND TYPE OF COUNSEL REQUIRED BY UNIQUE AND DIVERSE PRISON INMATE POPULATION.

In the trial court's opinion, great reliance is placed upon decisions which prohibit teachers in public schools from religious exercise. See, **e.g., Lynch** v. **State University Board of Trustees,** 177 Ind. App. 172, 378 N.E.2d 900 (Ind.), **cert. denied,** 441 U.S. 946 (1978); 60 LEd2d 1048; 99 S Ct 2166; **Bender** v. **Williamsport Area School District,** 741 F.2d 538 (3d Cir. 1984), **cert. granted,** 105 S Ct 1167 (1985).

These cases are distinguishable from the instant case in three respects. First, those cases dealt with students who were impressionable children; here, the listeners are adults. Thus, the danger of unduly influencing the listener against his will is **de minimis** at best. Here, there is no risk that the inmate will mistakenly form the belief that Mr. Spratt's religious beliefs are established and endorsed by the State.

A second distinguishing factor is the voluntariness of the listener.

Unlike the student in the classroom, the inmate does not have to subject himself to counseling. Moreover, the inmate selects the method of treatment, and will not receive treatment by spiritual means unless he asks for it. Thus, there are ample safeguards to ensure that an inmate is not exposed to religion against his will.

The trial court's reliance on **Campbell** v. **Cauthron,** 623 F.2d 503 (8th Cir. 1980); and **O'Malley** v. **Brierly,** 477 F.2d 785 (3d Cir. 1973) is likewise erroneous. Unlike those cases, the exposure by inmates to religion here is entirely voluntary.

Finally, and most significantly, the counseling is performed by a trained, competent professional. It is tailored to the individual's needs and desires, and done in a professionally acceptable manner. In the case at bar, the defendants, all of whom lack training and experience in counseling, have established a policy which interferes with the counselor's professional judgment. In essence, it deprives him, and his patients, one of the tools for treating mental illness. Thus, in the name of religious neutrality, the defendants have usurped the professional judgment of the counselor.

This usurpation is not, however, required by this Court. Recently, there has been a departure from earlier tests. The Court has assumed a new tact focusing on the accommodation, neutrality and historical perspective. In **Marsh** v. **Chambers,** 463 US 783; 77 LEd2d 1019; 103 S Ct 3330 (1983), and **Lynch** v. **Donnelly,** 465 US 668; 79 LEd2d 604; 104 S Ct 1355 (1984), the Court announced and affirmed that it would take a historical approach to issues regarding religious liberty and establishment.

For instance in **Marsh,** the court upheld the Nebraska legislature's paid chaplaincy practice in light of an establishment claim. The Court reasoned that "historical evidence in the context of this case sheds light not only on what the drafters of the First Amendment intended the establishment clause to mean, but also on how they thought that clause applied to the chaplaincy practice authorized by the First Congress." **Id.** at 77 LEd2d 1026.

The **Marsh** Court further held:

> "In light of the . . . history . . . there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment of religion." **supra** at 77 LEd2d 1028.

Instead the Court characterized the practice as an "asknowledgment of beliefs widely held among the people of this country." **supra** at 77

LEd2d 1028. The fact that the Chaplain was paid at public expense and that the prayers were in the Judeo-Christian tradition did not serve to invalidate Nebraska's practice.

In the following term, the Court in **Lynch, supra,** used even stronger language, declaring that:

> "The Constitution affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. (citations omitted) Anything less would require the 'callous indifference, '[that] was never intended by the establishment clause." **supra** at 465 US 674, 79 LEd2d 610.

Furthermore, the Court declared that "[t]he Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." **supra** at 465 US 674, 79 LEd2d 610. **Lynch** held that a city's inclusion of a nativity scene in its annual Christmas display did not violate the establishment clause. The Court indicated that "the focus of [the] inquiry must be on the creche in the context of the Christmas season . . . [to] focus exclusively on the religion component of any activity would inevitably lead to its invalidation under the Establishment Clause." **supra** at 465 US 682, 79 LEd2d 614.

Historically, counseling from a religious perspective dominated the counseling field. It was not until the more recent advent of Freudian psychology and Skinnerian behavioral psychology that religious counseling found competition.

Given the Court's historical test in light of establishment and free exercise claims, the Plaintiff's counseling from a religious perspective falls well within the history of the discipline. If invoking divine guidance upon the body who makes the laws is constitutionally permissible, as in **Marsh,** then offering divine guidance to those who break the law must also be constitutionally acceptable as in the instant case. The same rationale providing for the permissibility of religion in prison as part of the chaplaincy (i.e., the protection of religious liberty in an environment diametrically opposed to it) establishes the primary reason for extending religious practices as a viable means of treating mental illness in government supported penal institutions on the part of their counselors.

This case affords the Court an opportunity to give a definitive statement on the historical-framer's intent issue, which has been the subject of recent controversy involving Justices of the Court and the U.S. Attorney General.

V.

THE LOWER COURTS ERRED BY CONSTRUING THE FREE EXERCISE RIGHTS OF PRISON INMATES TO ONLY REQUIRE "ACCESS TO VOLUNTARY CHAPLAINS OF ALL FAITHS WHO SERVE THE JAIL," TO THE EXCLUSION OF DIVERSE COUNTY COUNSELORS WITH PROFESSIONAL UNDERSTANDING OF WIDE BREADTH AND DIVERSITY OF COUNSELING THEORIES AND TECHNIQUES, RELIGIOUS OR OTHERWISE.

Michigan's Department of Mental Health has recognized that the spiritual needs of inmates are the proper subject of concern and treatment by counselors, if requested by the prisoner. (Michigan Administrative Code 1979, Rule 330.7135). Plaintiff's expert witness has also indicated that treatment by spiritual means is appropriate in cases where the patient has a religious background and asks for such treatment.

Notwithstanding this unrebutted evidence, the courts below held that the inmates' religious needs can only be met by volunteer chaplains. This, of course, ignores the inmates' rights to such treatment by trained professionals, as established by Michigan law, MCLA 330.1704; MSA 14.800 (704).

In the area of the free exercise of religion, it is incumbent upon the State to strike the balance in favor of the least restrictive alternative. Here, the least restrictive option is to make available to inmates both the chaplains and the professional counselor. The latter brings the inmate a professional understanding of mental illness and a wide breadth and diversity of counseling theories, religious or otherwise.

The recent Supreme Court decision in **Witters** v. **Washington Department of Services for the Blind,** ____ U.S. ____; ____ S Ct ____; ____ LEd2d ____ (54 U.S.L.W. 4135) (1986) is helpful in this regard. There, plaintiff applied for vocational rehabilitation assistance pursuant to a Washington statute. He was attending a private Christian college, training to become a minister, missionary or Church youth director. He was denied aid on the ground that it would have the primary effect of advancing religion in violation of the Establishment Clause.

Ruling in favor of the plaintiff, the Court noted that the assistance provided is paid directly to the student, who transmits it to the educational institution of his choice, **Witters, supra,** at 54 U.S.L.W. 4136. Central to the Court's decision was the observation that:

> "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genu-

inely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." . . . In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." **supra**, at 4136-4137.

Justice Powell's concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, elaborates further:

"The Court's omission of Mueller v. Allen, 463 U.S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that Mueller is somehow inapplicable to cases such as this one. I write separately to emphasize that Mueller strongly supports the result we reach today.

"As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). See also Committee for Public Education v. Nyquist, 413 U.S. 756, 783-785, n. 39 (1973). Mueller makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the Lemon v. Kurtzman test, because any aid to religion results from the private choices of individual beneficiaries. Mueller, 463 U.S. at 398-399. Thus, in Mueller, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. Id., at 401. We noted the state's traditionally broad taxing authority, id., at 396, but the decision rested principally on two other facts. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Id., at 397; see Nyquist, 413 U.S., at 782-783, n. 38. Second, any benefit to religion resulted from the "numerous, private choices of individual parents of school-age children." Mueller, supra, at 399." **supra**, at 4137-4138.

The proper perspective is to view the program as a whole, rather than the particular individual's case, **supra**, at 4138. Justice O'Connor's concurring opinion supports this view:

As Justice Powell's separate opinion persuasively argues, the Court's opinion in Mueller v. Allen, 463 U.S. 388 (1983), makes clear that "state programs that are wholly neutral in offering

educational assistance to a class defined without reference to religion do not violate the second part of the Lemon v. Kurtzman test, because any aid to religion results from the private decisions of beneficiaries." Ante, at 1-2 (Powell, J., concurring) (footnote omitted). The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the state itself is endorsing a religious practice or belief. See Lynch v. Donnelly, 465 U.S. 668, 690 (1984). **supra**, 4138.

In the case at bar, the decision to use religious counseling or treatment by spiritual means rests with the individual inmate. Mr. Spratt did not force or coerce the inmates into accepting this counseling technique. Rather, the various options were explained and the inmate, who voluntarily participated in counseling, made a choice (Spratt at Tr. 13, 32-33, 35, 156).

Thus, when the counseling provided by plaintiff is viewed as a whole, rather than on the basis of isolated cases, the **Lemon** test is satisfied. The religious assistance, if any, is the result of the individual inmate's private choice. Under such circumstances, it cannot be inferred that the State itself was endorsing a religious practice or belief.

RELIEF SOUGHT

For the reasons stated herein, appellant prays that this Court grant his petition for a writ of certiorari of the decision of the Sixth Circuit Court of Appeals. Several federal issues of importance, many of which are the subjects of hot debate in American Jurisprudence, are raised by this case. Moreover, the decisions below are great departures from federal law as embodied in statutes and the opinions of the Court.

Respectfully submitted,

Robert C. Spratt

Robert C. Spratt

Dated: January 15, 1987

APPENDIX

A. District Court Judgment and Opinion

B. Sixth Circuit Court of Appeals Bench Decision Statement Form and Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT C. SPRATT,
Plaintiff,

v. File No. G81-817 CA

COUNTY OF KENT, PHILIP J. HEFFRON, Sheriff, A. THOMAS PALMER, and ROLAND TANIS,
Defendants.

JUDGMENT

/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 12th day of November, 1985.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated November 12, 1985, IT IS HEREBY ORDERED that the Court finds in favor of defendants and enters judgment for defendants and against plaintiff.

IT IS SO ORDERED.

S/S
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Certified As A True Copy
Gerald H. Heter, Clerk

By I. Nowak , Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 11/12/85

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT C. SPRATT,
Plaintiff,

v. File No. G81-817 CA

COUNTY OF KENT, PHILIP J. HEFFRON, Sheriff, A. THOMAS PALMER, and RONALD TANIS,
Defendants

OPINION

---/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff claims that he was unjustly discharged from his employment as a social worker for Kent County because of his religious beliefs. He claims that his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e **et seq.**, have been violated. He also claims, under 42 U.S.C. §§ 1983 and 1985, that defendants deprived him of his constitutional rights to equal protection and freedom of religion and speech.

I. FINDINGS OF FACT

Set forth below are the Court's general findings of fact. Findings relating specifically to plaintiff's legal theories are incorporated into the Court's discussion of those theories.

1. Plaintiff Robert Spratt is a citizen of the United States of America and a resident of the State of Michigan.

2. Plaintiff obtained a Bachelor of Science Degree and a Masters Degree in Social Sciences from Michigan State University.

3. Plaintiff was employed by Kent County as a counselor to provide counseling and therapy for inmates at the Kent County Honor Camp and was later transferred to the Jail to provide the same service for those inmates.

4. Plaintiff describes himself as a "Pentecostal Christian." Such individuals, according to plaintiff, belong to different Christian churches and denominations or belong to no particular denomination. They are tied together, plaintiff explained, by their belief that the Gifts of the Holy Spirit are alive today. Plaintiff described Pentecostal Christianity as a "belief system." Plaintiff explained that he is an "evangelist" who attempts to spread the Gospel whenever the opportunity presents itself. In the Court's judgment, plaintiff is very sincere in his beliefs.

5. Plaintiff filed a charge against defendants with the EEOC and received his right to sue letter on August 7, 1981. Thereupon, and in a timely fashion, he filed his complaint with this Court.

6. Defendant Philip Heffron is, and was at all times pertinent to this litigation, Sheriff of the County of Kent, a municipal corporation in the State of Michigan.

7. Defendant Roland Tanis is a resident of the State of Michigan who, at all times pertinent to this litigation, was employed at the Kent County Sheriff's Department.

8. Defendant A. Thomas Palmer, at all times pertinent to this litigation, was a County paid lieutenant of the Kent County Sheriff's Department who directed the Inmate Services Program at the Kent County Correctional Facility.

9. While employed as a social worker for Kent County and assigned to the Kent County Jail, plaintiff used a counseling technique which he described as "treatment by spiritual means." According to plaintiff, this treatment modality is a means of allowing the spirit of God to administer to both the counselor and counselee. Among the specific techniques used by plaintiff were Bible reading, prayer, addressing spiritual issues, and, in at least one instance, the "casting out of demons."

10. Plaintiff explained that, when initiating therapy with an inmate, he generally spent the first few sessions diagnosing whether the inmate suffered any mental illnesses (the predominant ones he encountered being depression and anxiety). He would then present to the inmate various means by which the illness could be treated. One of the options suggested was treatment by spiritual means.

11. Plaintiff testified that he only treated by spiritual means when an inmate requested that particular treatment modality. When asked whether he used any encouragement with respect to the different options, plaintiff responded that he did in some cases but not as a general rule.

12. Plaintiff was first employed by Kent County at the Honors Camp, a youth correctional facility. Sheriff Heffron transferred plaintiff from his assignment in the Honors Camp to the Kent County Jail in September of 1978. Sheriff Heffron decided to transfer plaintiff because plaintiff's evangelically religious methods of counseling had alienated many of the youths at the camp. It is not clear whether the reason for the transfer was made clear to plaintiff.

13. Plaintiff admits that Lieutenant Palmer told him immediately after the transfer to the jail that he was not to carry his Bible into the jail. Plaintiff complied with this requirement by bringing some inmates into his office for counseling where he freely used the Bible.

14. Sheriff Heffron testified that the County makes provision for the spiritual needs of inmates by having available a corp of chaplains from various faiths. Those chaplains are not paid by the County. Sheriff Heffrom has established a policy that does not permit county paid social workers to use religious counseling because he believes he is constitutionally compelled to maintain an atmosphere of religious neutrality within the jail.

15. According to Sheriff Heffron, plaintiff was advised when he came to work full time at the jail that he was not to intermix religious counseling with psychological counseling, but was to refer requests for religious counseling to the chaplains at the jail. The Sheriff's policy forbidding treatment by spiritual means, even when requested by an inmate, was made known to all counselors employed at the jail.

Plaintiff testified that he was never told absolutely that he was not to use treatment by spiritual means. He testified that Sheriff Heffron told him to use it only as a last resort and to use it discretely. Sheriff Heffron denied that he made such statements.

The Court resolves this conflict in the evidence in defendants' favor. Sheriff Heffron and Lieutenant A. Thomas Palmer both testified that plaintiff was advised to cease his religious counseling when he came to

the jail. Based on other inconsistencies in plaintiff's testimony, the Court concludes that plaintiff's denial of such advise is based on selective recall and that plaintiff's testimony in this regard is not credible.

16. At a meeting in April of 1979 with plaintiff, Sheriff Heffron expressed concern regarding complaints from women inmates that plaintiff was using religious counseling. The sheriff advised plaintiff that one reason such counseling was inappropriate was that, as sheriff, he could be sued by inmates who were offended by plaintiff's practices. The Sheriff testified that he told plaintiff to cease his religious counseling. In plaintiff's version of this meeting, Sheriff Heffron did not absolutely prohibit him from using religious counseling, but merely advised him to be discrete about it. Again, the Court finds the sheriff's testimony to be more credible.

17. Plaintiff's case work supervisor at the jail was defendant Roland Tanis. Plaintiff admitted that he had difficulty accepting Tanis as his supervisor because he considered his academic credentials to be superior to those of Tanis. At a meeting held in April of 1979, Sheriff Heffron clarified for plaintiff the fact that Tanis was and would be his supervisor and that Tanis had the ultimate authority to determine the type of counseling service inmates were to receive.

18. Plaintiff was suspended for five days on December 17, 1979, for insubordination. That suspension resulted from a complaint from the mother of an inmate after plaintiff had purportedly cast a demon out of her son. In the suspension notice, Sheriff Heffron advised plaintiff he was being suspended "because of continuing complaints that you are using religion in your psychological counseling, after being informed that it was not in the best interests of this Department, or the inmate being counseled, to do so."

19. Plaintiff grieved his suspension. The grievance was denied. Plaintiff was advised that the County would not permit him to introduce or use his religious beliefs or practices as part of his counseling techniques and that failure to adhere to that direction would result in his discharge.

20. The issue of Tanis's supervision was again brought out at a January 18, 1980, meeting attended by plaintiff, Sheriff Heffron, Roland Tanis, Lieutenant Palmer, and plaintiff's minister. At that meeting, Sheriff Heffron reiterated that Tanis was and would be plaintiff's casework supervisor and that plaintiff should not use his Bible in counseling.

21. At one point, plaintiff attempted to convince the Kent County Community Mental Health Department to write into the job description of the counselor assigned to the jail a statement that counseling by spiritual means would be appropriate. Plaintiff also suggested to the

Sheriff that, in order to allow plaintiff to continue spiritual counseling, the County should take out malpractice insurance to protect itself from the liability that might arise if an inmate sued the County because of plaintiff's counseling methods.

22. On February 26, 1980, plaintiff was reprimanded for using waiver forms that he drew up to obtain the consent of inmates to treat them by spiritual means. Plaintiff had not obtained approval from any of his superiors for use of the forms.

23. Sheriff Heffron fired plaintiff on that same day for insubordination. In his termination letter, Sheriff Heffron advised plaintiff that he was being terminated because he "continued to practice an improper mix of religion and psychological counseling" and did not "have a desire or willingness to follow the direction given to [him] . . ."

24. Plaintiff admitted that he was insubordinate on the issue of reading the Bible and praying with inmates. He stated that it would have been a violation of his religious beliefs to refuse to do these things under the circumstances.

25. When asked whether he ever made any effort to accommodate plaintiff's religious beliefs, Lt. Palmer stated that he had not because those beliefs did not "fit in" with the job plaintiff was hired to perform. Lt. Palmer testified that Sheriff Heffron had a policy that counselors simply could not use religion in their counseling.

Similarly, Sheriff Heffron opined that accommodation was not possible in plaintiff's case. He explained that he felt he was compelled by law not to allow religious counseling by a county social worker. He did not ask plaintiff to shed his Christian beliefs when he came to work, but he did ask him to leave them out of his counseling. Sheriff Heffron testified that he gave some thought to means to accommodate plaintiff's religious beliefs but concluded that the only solution was to absolutely prohibit religious counseling.

26. Dr. Alcid Pellitier, who has a masters degree in psychology and a doctorate in education, opined that religion may, in some circumstances, be an appropriate part of the counseling process because counselors "use whatever the patient gives us." Dr. Pelliter added that, if the patient was not religious, it would be improper for a therapist to impose his or her religion on the patient.

27. At one point, plaintiff testified that it is not possible to separate his religious beliefs from his role as a counselor. Yet plaintiff also testified that his religion does not require him to read the Bible or pray with co-workers. He testified further that it was not inconsistent with his religious beliefs to give non-religious treatment if that is what the inmate asked for. At one point, plaintiff explained that treatment by

spiritual means was not the practice of his religion, but was a practice of mental health counseling.

28. Plaintiff's testimony regarding the circumstances under which he used treatment by spiritual means was somewhat contradictory. The Court concludes from the totality of his testimony that plaintiff did in fact use his position as a counselor in the Kent County Jail to evangelize. Although plaintiff would not have forced treatment by spiritual means upon an unbelieving inmate who rejected that approach, he would have strongly encouraged treatment by spiritual means for any inmate who was at all receptive. Further, based on plaintiff's continuing acts of insubordination, Sheriff Heffron and the other defendants had every reason to believe plaintiff would continue his practice of treating by spiritual means.

29. The Court finds that with respect to the establishment and enforcement of his policy prohibiting religious counseling by County social workers, defendant Heffron acted with good faith belief that such policy was compelled by law. This good faith extended to each of defendant Heffron's actions toward plaintiff. Additionally, defendant Heffron set and enforced this policy and took each of his actions toward plaintiff solely in his official capacity as the Sheriff of the County of Kent.

30. At one point, the sheriff sought legal advise regarding his dealings with plaintiff. The opinion of the County's legal counsel, given to the County Personnel Director and the sheriff, stated that the sheriff's policy was necessary to safeguard inmates' religious freedom rights and to comply with constitutional requirements of governmental religious neutrality.

31. Defendant Palmer's actions pertaining to plaintiff were also motivated by good faith, without malice, and were taken only pursuant to his responsibilities as the Directer of the Inmate Services Program at the Kent County Correctional Facility. In that position he was responsible for implementing the sheriff's policies and directives. He had no authority to disregard or alter the sheriff's policy in order to accommodate plaintiff or anyone else.

32. The Court finds no credible evidence that defendant Tanis was motivated in his actions pertaining to plaintiff except by a good faith intent to obey Lt. Palmer's directives that he supervise plaintiff's caseload and report his findings.

33. Plaintiff failed to prove that any of the individual defendants had animus toward Christians, Pentecostal Christians, Pentecostal Christian counselors who seek to treat by spiritual means, or toward any other religious group in which plaintiff claims membership.

II. CONCLUSIONS OF LAW

Plaintiff has raised statutory claims of discrimination under Title VII as well as constitutional claims under 42 U.S.C. §§ 1983 and 1985. The Court will address these issues seriatim.

A. Title VII Claims

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides that an employer may not "discharge any individual . . . because of such individual's . . . religion." 42 U.S.C.A. § 2000e–2(a)(1) (1981). Section 701 further explains that

> [t]he term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C.A. § 2000e(j) (1981).

Defendants argue that they have not violated Title VII in this case because: 1) plaintiff has failed to establish a bona fide religious belief, **see Yott** v. **North American Rockwell Corp.**, 602 F.2d 904 (9th Cir. 1979), **cert. denied,** 455 U.S. 928 (1980); 2) plaintiff was not qualified to perform the job for which the county hired him because he was not able to follow the direct orders of his supervisors, **see Texas Department of Community Affairs** v. **Burdine,** 450 U.S. 248, 253 (1981); 3) the County had a legitimate, nondiscriminatory reason for plaintiff's discharge, namely his insubordination, **see McDonnell Douglas Corp.** v. **Green,** 411 U.S. 792, 802-806 (1973); and 4) the County accommodated plaintiff's religious beliefs to the extent it was possible to do so in these circumstances, **see Trans World Airlines, Inc.** v. **Hardison,** 432 U.S. 63, 84 (1977). Because the Court finds for defendants on the latter argument, it need not address the first three arguments.[1]

The issue raised in this case is different than that raised in a typical accommodation case where an employee is requesting an adjustment in his work schedule to permit him to observe his sabbath. Here the religious practice for which plaintiff was seeking accommodation was a religiously compelled need, when called upon, to engage in prayer and the quoting of scripture.[2] It appears, and the Sheriff could certainly conclude, that plaintiff's religious beliefs also compelled him to engage, to some extent, in evangelizing. That is, if an inmate was at all receptive to plaintiff's suggestion that treatment by spiritual means was indicated, the evidence suggests that plaintiff would have strongly urged the inmate to accept that form of treatment.

Considering the facts of this case and the constitutional law in the area of religious practice in public institutions, the Court concludes that Sheriff Heffron had very limited flexibility with which to accommodate plaintiff's religious practices. The sheriff had an obligation under the establishment clause of the constitution to maintain a policy of neutrality on religious matters. **See Wallace** v. Jaffree, ____ U.S. ____, 105 S. Ct. 2479 (1985); **Meek** v. **Pittenger,** 421 U.S. 349 (1975); **Abington School District** v. **Schempp,** 374 U.S. 203 (1963). He was required to avoid the appearance of favoring one religion over others or religion over nonreligion. At the same time, Sheriff Heffron had an obligation to allow for the free religious exercise of the inmates. **See, e.g., Hoggro** v. **Pontesso,** 456 F.2d 917, 918 (10th Cir. 1972); **Cooper** v. **Pate,** 382 F.2d 518, 521 (7th Cir. 1967). Sheriff Heffron chose to walk the narrow line between the free exercise and establishment clauses by forbidding county paid social workers from using religious counseling techniques while, at the same time, allowing inmates access to voluntary chaplains of all faiths who serviced the jail.

Within these narrow straits, the sheriff made what this Court considers to be reasonable efforts to accommodate plaintiff's religious practices. He advised plaintiff that he had a policy that prohibited the county social workers from using religious counseling techniques. He warned plaintiff repeatedly when he discovered that plaintiff was crossing the line that his policy had drawn. Sheriff Heffron also asked for legal advice to determine whether plaintiff's religious needs could be accommodated. Finally, he gave plaintiff numerous opportunities to change his practices. The Court concludes that defendant County, acting through Sheriff Heffron, made every effort at accommodation reasonably available under the circumstances. **See Trans World Airlines, Inc.** v. **Hardison,** 432 U.S. at 84 (1977) (employer need not take actions that would adversely affect others or bear more than a **de minimis** cost in order to accommodate an employee's religious practices); **McDaniel** v. **Essex International,** 571 F.2d 338, 344 (6th Cir. 1978); **Baz** v. **Walters,** 599 F. Supp. 614 (D.C. Ill. 1984) (discharge of government chaplain appropriate when chaplain continued to evangelize and proselytize against orders). Accordingly, plaintiff has not proven a violation of Title VII.

B. Constitutional Claims

1. First Amendment

The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const., amend. I. Because the first

amendment applies with equal force to the states, **Cantwell** v. **Connecticut,** 310 U.S. 296 (1940), its two mandates apply to state and local governments.

Although plaintiff has raised a claim under the free exercise clause, both the establishment clause and the free exercise clause must be considered in evaluating his first amendment claim. Administrators of public institutions, such as schools and prisons, are required to balance the first amendment rights of their employees to freely exercise their religions against the first amendment's prohibition on the "establishment" of religion and against the free exercise rights of other individuals. **See, e.g., Lynch** v. **Indiana State University Board of Trustees,** 177 Ind. App. 172, 378 N.E.2d 900, 905 (Ind.), **cert. denied,** 441 U.S. 946 (1978) (finding no constitutional violation when public school dismissed instructor who insisted on reading the Bible to his students in the classroom).

Here, plaintiff has asserted a first amendment right to freely practice his religious beliefs. The Court does not deny that plaintiff has certain rights to practice his religion freely in our society. When, however, exercise of an individual's first amendment rights potentially violates free exercise rights of others or the mandates of the establishment clause, the individual's rights are not absolute. **See Bender** v. **Williamsport Area School District,** 741 F.2d 538, 550 (3d Cir. 1984), **cert. granted,** 105 S. Ct. 1167 (1985). On the facts of this case, the Court concludes that plaintiff's constitutional right to the free exercise of his religion does not go so far as to permit him to use religious counseling methods against the orders of his superiors.

It has been held that the practice of permitting lay witnesses to enter jail cell blocks for the purpose of preaching, singing, and witnessing to inmates violates the free exercise rights of prisoners who do not wish to hear the message if no efforts are made to ensure that those inmates are not present. **Campbell** v. **Cauthron,** 623 F.2d 503, 509 (8th Cir. 1980). The free exercise clause requires that no inmate be subjected to force indoctrination. 623 F.2d at 509.

This same rationale would prohibit plaintiff's conduct in this case. Here, evidence suggests that, although plaintiff did not overtly coerce inmates into accepting religious counseling, he suggested to at least some inmates that treatment by spiritual means was the preferred method of treatment. Thus, there was a danger of forced indoctrination.

Further, the facts of this case are even stronger than those of **Campbell** because the establishment clause is implicated as well. Here, rather than having lay witnessing by individuals outside the jail staff,

the individual bringing the religious message to the inmates was an employee of the county. Thus, the County could be accused of violating the establishment clause. **See Lynch** v. **Indiana State University Board of Trustees,** 378 N.E. 2d at 908.

The Court concludes that plaintiff's use of religious counseling was potentially violative of the establishment clause and the free exercise rights of inmates. Because plaintiff's free exercise rights must be limited to the extent that his conduct would infringe upon the establishment clause or constitutional rights of others, he cannot assert a constitutional right to continue such conduct. **Cf. O'Malley** v. **Brierly,** 477 F.2d 785, 789 (3d Cir. 1973) (priests had no absolute right under the free exercise clause to give religious counseling to inmates).

Similarly, any claims that plaintiff could make under the free speech clause of the first amendment must fail as well. In the public employment context, once an employee asserts a free speech right, the Court must determine whether the employer's curtailment of plaintiff's speech results from the need to protect a compelling state interest. **Pickering** v. **Board of Education,** 391 U.S. 563, 568 (1968). That compelling interest exists here. The County is not required to let plaintiff speak on religious issues if that speech violates the establishment clause or the free exercise rights of inmates.

2. Equal Protection

Plaintiff has not carried the burden of proving an equal protection violation. No evidence was presented to suggest that plaintiff was disciplined and ultimately fired because he was a Christian or a Pentecostal Christian. The weight of evidence suggests that Sheriff Heffron and the other defendants applied the sheriff's policy prohibiting religious counseling to all counselors, irregardless of religion. Because plaintiff has not proven that he was treated in a particular way because he was a member of an identifiable class, his equal protection claim must fail. **See Massachusetts** v. **Feeney,** 442 U.S. 256 (1979) (gender); **Washington** v. **Davis,** 426 U.S. 229 (1976) (race); **Brown** v. **Alexander,** 718 F.2d 1417 (6th Cir. 1983) (membership in a particular union); **Rodgers** v. **Tolson,** 582 F.2d 315 (4th Cir. 1978) (member of a group of residents who had criticized city commissioners).[3]

3. Conspiracy

In addition to his claims under 42 U.S.C. § 1983, plaintiff has raised a claim under 42 U.S.C. § 1985(3) alleging a conspiracy on the part of the individual defendants to deprive plaintiff of his constitutional rights. Just as plaintiff has failed to establish an identifiable class for the purposes of this 1983 equal protection claim, he has similarly failed to

establish the class-based invidiously discriminatory animus necessary to support a claim under section 1985. **Macko** v. **Brian,** 641 F.2d 447, 450 (6th Cir. 1981). Thus, this claim fails.

Dated: November 12, 1985 S/S _____
BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

FOOTNOTES

[1] Defendants have also argued that the accommodation provision of Title VII is unconstitutional. The Court finds it unnecessary to rule on the constitutionality issue in light of its finding that any accommodation obligation imposed on the County has been met.

[2] The Court has not resolved whether plaintiff's practice of praying with and reading scripture to inmates was a "religious practice." Different portions of plaintiff's testimony give conflicting views on this issue. Plaintiff testified at one point that he was religiously compelled to pray and share scripture with inmates who requested him to do so. At other points in his testimony, plaintiff said that his use of treatment by spiritual means was **not** a practice of religion but a practice of mental health counseling. For purposes of plaintiff's Title VII arguments, the Court will assume arguendo that his praying and sharing scripture with inmates was a religious practice.

[3] Although plaintiff originally stated a claim that his due process rights were violated, because he did not raise that claim at trial or in his post-trial filings, the Court presumes that it has been dropped.

BENCH DECISION STATEMENT FORM

CASE NO.: 85-1978
CASE TITLE: Spratt v. County of Kent, et al.
DATE ARGUED: November 7, 1986
PANEL: Lively, Martin, Boggs
SPEAKING JUDGE: Lively

Filed
Nov. 7, 1986
John P. Hehman,
Clerk

The court has had this record before it for about five weeks now, and we have studied it, we have examined the briefs as well as the trial court record and we have studied very carefully Judge Gibson's opinion. I find considering all of the arguments made by the appellant, the court concludes that the district court properly resolved this conflict. Mr. Pratt was discharged for insubordination and that is not contested in this record. He defied a direct order from his superior and that was the cause of it. The court cannot see any difference between the limitations that the sheriff put on Mr. Spratt and similar ones on any other employee of the jail and we believe that it was within his authority to require this and that Judge Gibson's approach to the case was proper. Accordingly, the judgment of the district court is affirmed.

A TRUE COPY
Attest: JOHN P. HEHMAN, Clerk

By S/S_____, Deputy Clerk

(Seal) (Attest)

This certifies that the foregoing is a true copy of the statement from the bench at the conclusion of argument.

EXHIBIT D

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

NO. 85-1978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT C. SPRATT,
Plaintiff-Appellant

vs.

COUNTY OF KENT, ET AL.,
Defendants-Appellees

Filed
Nov. 10, 1986
John P. Hehman, Clerk

ORDER

BEFORE: **LIVELY,** Chief Judge; **MARTIN** and **BOGGS,** Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be, and it hereby is, **affirmed.**

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

S/S_____

EXHIBIT C